

Advisory Opinion 2000-8

MONTGOMERY COUNTY ETHICS COMMISSION

ADVISORY OPINION

A member of the Montgomery County Board of Appeals has requested an advisory opinion concerning the propriety of representing, as a private attorney, a defendant corporation in a lawsuit in which the Washington Suburban Sanitary Commission (“WSSC”) is a co-defendant. The requester’s concerns arise out of the provisions of Article V of the Montgomery County Code, (“the Board of Appeals statute”), which prohibits the members of the Board of Appeals from engaging in certain conduct.

While expressing the view that the proposed representation is not proscribed, the requester properly sought the opinion of the Ethics Commission in order to ensure the absence of any impropriety. The requester asked this Commission for a waiver of any ethical prohibition it found to be applicable.

PERTINENT FACTS

The requester’s letter provided the following pertinent facts:

1. For the past several years, including the time of his appointment to the Board of Appeals, the requester has been a partner in a private law firm with a practice focused primarily in the area of construction contract law.
2. The requester had been contacted to represent a construction company in an action filed by a developer against the construction company and the WSSC.
3. The action involves claims relating to the allegedly improper installation of water and sewer pipes by the construction company under a contract with the WSSC on a project in Prince George’s County.
4. According to the requester, the interests of the Co-Defendants and the WSSC are the same, and there is no right of cross-claim between the construction company and the WSSC because their underlying contract requires that claims between them be decided in arbitration.

The requester’s letter was supplemented by a copy of the complaint that initiated the lawsuit, and a copy of the Claims and Disputes Clause of the potential client’s contract with the WSSC. The complaint contains six counts: (1) a breach-of-contract claim against the WSSC; (2) a negligence claim against the WSSC, the contractor, and an inspector employed by the WSSC; (3) a negligent misrepresentation claim against the WSSC and its inspector; (4) a fraud and fraudulent misrepresentation claim against the contractor; (5) a conspiracy to commit fraud claim against the contractor, the WSSC and its inspector; and (6) a punitive damages claim against the contractor and the WSSC’s inspector. The plaintiff seeks \$750,000 in compensatory and consequential damages on each of the first five counts, and \$2.5 million in punitive damages under the sixth count.

The Claims and Disputes Clause (Article 32) of the WSSC contract contains an arbitration provision that provides:

32.5.1 Any claim or dispute concerning termination of the services of the Contractor under General Conditions Article 19, timeliness of a Demand for Arbitration to The American Arbitration Association under this Article, timeliness of the Contractor's payment of the administrative fees of the American Arbitration Association, or the matters listed in Article 32.4.1, are not subject to binding arbitration. These matters shall be decided in the appropriate court in and for the State of Maryland. Subject to the limitations and conditions imposed in the Article, any other claim, dispute or other matter in question between the Contractor and the Commission arising under the terms and provisions of this Contract, including without limitation a claim for breach thereof, are subject to binding arbitration under the Construction Industry Arbitration Rules of the American Arbitration Association, except as those rules are modified by the terms of the Contract Documents. The terms and provisions of the Contract Documents are subject to interpretation under the laws of the State of Maryland.

32.5.2 A Demand of Arbitration shall be filed in with the American Arbitration Association, and a copy shall be filed with the Engineer and the Contracting Officer. Demand for Arbitration shall in no event be made on any claim, dispute or other matter in question, which would be barred by the applicable statute of limitations or by the provisions of the Article. Arbitration proceedings shall be held in a location selected by the Commission. Failure of the demanding party to pay the administrative fees of the American Arbitration Association within thirty days of the receipt of notice from the Association will constitute abandonment of the Demand for Arbitration and acceptance of the decision of the Contracting Officer as final and binding on the parties.

32.5.3 Demands for Arbitration shall be limited to issues specifically decided by the Engineer and by the Contracting Officer. Consolidation of individual Final Decisions of the Engineer will be permitted. Each Final Decision of the Engineer shall be arbitrated before the American Arbitration Association.

32.5.4 The Contractor shall not be permitted to present any evidence in the arbitration proceedings that was not included in the written presentation to the Engineer and Contracting Officer, required by Articles 32.1 and 32.3. It is further specifically agreed by the parties that the Award of the Arbitrator(s) shall contain a summary of the factual basis of the award and the arbitrator(s) rationale.

APPLICABLE LAW

1. Article V of the Montgomery County Code ("the Board of Appeals statute") contains a Code of Ethics (§2-IO9) that, in pertinent part, sets forth the following prohibitions:

(b) No member shall:

* * *

(2) Act as . . . attorney . . . [for] any person in his business dealings with the Washington Suburban Sanitary Commission . . .

* * *

- (4) Voluntarily appear as attorney counselor otherwise represent private interests or give opinion evidence against the interests of the county or its agencies or agencies of the state operating for the county in any action or proceedings in which the county or agency or any official of the county or agency acting in his official duty is a party, except where the interests of the county or agency are incompatible or adverse one to the other, and the member has been assigned to so appear or give evidence in accordance with his duty.
2. The Montgomery County Ethics Law specifically authorizes any person subject to §2-109 to ask this Commission for an advisory opinion on the meaning or application of that section to that person. See M.C.C., §19A-7(a).
3. The Ethics Commission's waiver authority is set forth in the Montgomery County Public Ethics Law as §19A-8 of the Montgomery County Code:

After receiving a written request, the Commission may grant to a public employee or a class of public employees a waiver of the prohibitions of this Chapter and Sections 11B-51 and 11B-52(a) . . .

CONCLUSION

1. *The Prohibition Applies.* After carefully considering the request and the supporting documentation, the Commission concluded that the proposed representation would be within the prohibition of §2-109(b) because it would constitute acting as an attorney for a person in his or her business dealings with the WSSC.

The Commission did not view the interests of the contractor and the WSSC to be the same. The lawsuit arises out of work performed by a company under a contract with the WSSC, and the allegations set forth in the Complaint portend a dispute between the contractor and the WSSC that is so potentially significant as to be virtually inevitable. If not capable of being raised by cross-claim in the litigation,¹ his potential dispute undoubtedly would, at the very least, affect the trial strategy of and perhaps negotiations among the contractor and the WSSC. They will have to work together as co-defendants, while all the while protecting themselves from each other's potential claims under their contract. The litigation, therefore, arises out of the contractor's business dealings with the WSSC and will directly impact those business dealings. The prophylactic purposes underlying the Board of Appeals' Code of Ethics prohibitions compel the conclusion that the representation of a WSSC contractor in such litigation constitutes, for the purposes of those prohibitions, the representation of a person in connection with the person's business dealings with the WSSC.

2. *The Commission Cannot Waive the Prohibition.* The Ethics Commission concluded that it was unable to grant the request for a waiver because it does not have the authority to waive the prohibitions of §2-109. The Commission's waiver authority arises solely under §19A-8, and expressly applies only to the prohibitions contained in Chapter 19A (the Public Ethics Law) and

¹ Although the scope of the Arbitration Clause of the WSSC contract is beyond the ken of the Ethics of Commission, the Commission notes that the relatively narrow scope of the procedural prerequisites set forth in that clause support the view that arbitration is required only with respect to demands by the contractor, and, consequently, that the Clause would not prevent the WSSC from filing cross-claims in the pending litigation.

§§11B-51 and 11B-52(a) (the Procurement Law). The prohibitions set forth in the Board of Appeals' Code of Ethics are not waivable.

[signed]

Walter A. Scheiber, Chairman

May 22, 2000

NOTICE OF POST-DECISIONAL RIGHTS

A final decision of the Commission on a request for a waiver may be appealed to the Circuit Court under the applicable Maryland Rules of Procedure governing administrative appeals. An appeal does not stay the effect of the Commission's decision unless the court hearing the appeal orders a stay. Montgomery County Code, §19A-6(c).

A person affected by a final decision of the Commission on a request for waiver may ask the commission for reconsideration. A request for rehearing or reconsideration must be filed within 30 days after the issuance of the commission's final decision, and must state in writing all reasons in support of the request. A request for reconsideration does not stay the effect of the Commission's decision unless the Commission orders otherwise. However, a request for reconsideration stays, until the Commission takes final action on the request, the time in which an appeal may be filed. Montgomery County Code, §19A-6(d).